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NO. 90-89

Supreme Court, U.S.
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In the
Supreme Court of the United States

OCTOBER TERM, 1990

INTERNATIONAL PRIMATE PROTECTION LEAGUE AND ITS MEMBERS, PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS AND ITS MEMBERS, ALEX PACHECO, AND LOUISIANA IN SUPPORT OF ANIMALS AND ITS MEMBERS

Petitioners

V.

ADMINISTRATORS OF TULANE-EDUCATIONAL FUND, NATIONAL INSTITUTES OF HEALTH AND THE INSTITUTES FOR BEHAVIOR RESOURCES, INC.

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF ON THE MERITS ON BEHALF OF PETITIONERS

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QUESTION PRESENTED FOR REVIEW

1. Whether the Fifth Circuit properly ruled that a federal agency may remove to federal court a nonfederal action brought against it in state court. 28 U.S.C. Sec. 1442 provides that an action against an officer is removable, and there are conflicting decisions on whether an action against a federal agency, as opposed to one against a federal official, may be removed under this provision.

LIST OF PARTIES

1. International Primate Protection League and Its Members - Petitioners

2. People for the Ethical Treatment of Animals and Its Members - Petitioners

3. Alex Pacheco - Petitioner

4. Louisiana in Support of Animals and Its Members - Petitioners

5. Administrators of Tulane Educational Fund - Respondent

6. National Institutes of Health - Respondent

7. Institutes for Behavior Resources, Inc. - Respondent

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CITATION TO OPINION OF FIFTH CIRCUIT

The opinion of the United States Court of Appeals for the Fifth Circuit in *International Primate Protection League v. Administrators of Tulane Educational Fund, et al*, rendered on March 8, 1990, is reported at 895 F.2d 1056, and is set forth in the Appendix at A-1 through 16.[1]

JURISDICTION

This Court's Jurisdiction is invoked under 28 U.S.C. Sec. 1254(1). The judgment of the Court of Appeals was entered on March 8, 1990. A petition for rehearing was denied by that court on April 13, 1990. A petition for a Writ of Certiorari was filed on July 12, 1990. Certiorari was granted on November 26, 1990.

STATUTE INVOLVED

28 U.S.C. Sec. 1442(a)(1) provides in pertinent part:

> (a) A civil action or criminal prosecution commenced in a state court against any of the following persons may be removed by them...
>
> (1) any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

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[1] Citations to the "Appendix" or "A-1" refer to the Appendix to the Petition for Writ of Certiorari; the Joint Appendix is referred to as "Jt. App."

STATEMENT OF THE CASE

This case arises out of the spirited public debate concerning the "Silver Spring Monkeys." These 31 primates were formerly used in experiments conducted by a private research facility, the Institute for Behavioral Research ("IBR"), under a grant from the National Institutes of Health ("NIH"). In 1981, Maryland police raided the IBR laboratory and seized the surviving 17 monkeys. Most of the animals seized had crippled arms as the result of the experiment, and had deformed or missing fingers due to self-mutilation and inadequate veterinary care. The state of Maryland arrested and charged IBR principal investigator, Edward Taub, with violation of the state statute prohibiting cruelty to animals. The monkeys were initially placed in the custody of several of the plaintiffs, and were then delivered by plaintiffs to the NIH pursuant to a court order vesting temporary custody of the animals in NIH pending Taub's prosecution.[1] NIH terminated the experiment due to violations by Taub of the NIH Guide to the Care and Use of Laboratory Animals. Taub's laboratory was permanently closed, and all that remained was the disposition of the crippled animals.

From the time that the police seized the monkeys in 1981, plaintiffs have sought to ensure that the animals would not be further abused or needlessly killed. Several animal protection groups brought suit under the federal

[1] Taub, a psychologist, was convicted of multiple counts of animal cruelty. His conviction was later set aside because the Court of Appeals of Maryland held that the state anticruelty statute did not, as a matter of legislative intent, apply to animals used in scientific research. *See Taub v. State*, 296 Md. 439, 463 A.2d 819 (1983). Several months after the decision was handed down, the Maryland legislature amended the anticruelty statute to include animals used in experiments, irrespective of the source of funding, within the scope of the statute.

Animal Welfare Act, 7 U.S.C. sections 2131-2157 (1988), to protect the primates' interests, but the groups were found not to have standing to enforce the statute. *International Primate Protection League v. Institute for Behavioral Research*, 799 F.2d 934 (4th Cir. 1986), *cert denied*, 481 U.S. 1004, 107 S.Ct. 1624 (1987). In addition, various animal protection groups offered to NIH to purchase the animals, and to care for them at no expense to the government.

In 1986, NIH and IBR stated in writing that the primates were of no further scientific use, and that they had no plans to use the monkeys for any purpose now or in the future. More than 300 members of Congress petitioned NIH to release the animals to a sanctuary where the animals would be resocialized and given proper veterinary care for the remainder of their lives, and at no expense to the taxpayers.

NIH acknowledged the congressional concern, and promised Congress, in writing, that the animals: (1) would not be subjected to any further experiments; (2) that they would be receive needed veterinary care,[2] (3) that they would be resocialized; and (4) that they would be allowed to live out the remainder of their natural lives. Further, NIH stated to Congress that the monkeys would not be transferred from NIH to any other location without advance notice to key members of Congress who had indicated interest in the matter. Shortly thereafter, and without any notice of any kind, NIH transferred the monkeys from an NIH facility to the Delta Regional Primate Research Center ("Delta"), a branch of Tulane University, in Louisiana.

[2] As a result of Taub's experiments, several of the monkeys had crippled limbs that needed to be amputated. NIH promised that the crippled limbs would be amputated.

This move, and the subsequent experimentation to which the remaining primates have been expo ed, violates all of the promises that NIH made to Congress concerning the Silver Spring Monkeys. More than 100 Members of Congress have since co-sponsored federal legislation to compel NIH to transfer the surviving animals to a sanctuary. The controversy about the primates continues as animal protection groups, together with members of Congress, proceed to press for the release of the animals to an animal sanctuary, and criticize NIH for its blatant disregard of its promises concerning these animals.

After the primates were transferred to Delta, columnist Jack Anderson reported that the NIH planned to arrange in a clandestine manner a transfer of title to the animals to Tulane, and that Delta planned to kill the animals in order to moot the public controversy and to spare NIH any political embarrassment and responsibility for their death. Congressional uproar followed Anderson's report and five of the primates were transferred to the San Diego zoo. This litigation involves the four surviving monkeys.[3]

The present case was initially filed on December 28, 1988, shortly after petitioners learned that NIH, which had earlier stated in writing that the monkeys were of no remaining scientific value, and had promised Congress that the animals would be subjected to no further experiments and would be allowed to live out the remainder of their natural lives, planned to perform a lethal experiment on three of the remaining animals on December 29, 1988. Petitioners instituted the suit in state court, naming as defend-

[3] When this litigation began, there were nine remaining animals. Five have died during the pendency of the suit. Three were subjected to lethal experiments on July 6, 1990, after courts denied petitions for emergency injunctive relief. *See infra* note 4.

ants NIH, IBR, and the Administrators of the Tulane Educational Fund ("Tulane"), the custodian of the animals. The suit alleged that there was no legitimate research interest to be pursued and that the primates were being killed for political reasons,[4] that the plaintiff animal protection groups and their members would be aggrieved irreparably by the destruction of the primates, and that the destruction of the animals constituted a public nuisance, an intentional infliction of emotional distress, and a violation of public policy, all under Louisiana law. Plaintiffs sought injunctive relief to prevent the killing of the animals, and sought to transfer custody to the plaintiffs or to members of Congress who had offered to purchase the animals and to facilitate a transfer of these animals to an appropriate animal sanctuary. (*See* Petition, A-30ff)

The state court immediately issued a temporary restraining order that prevented the killing of the animals. NIH then sought to remove the case to federal court, relying upon 28 U.S.C. section 1442(a)(1). A second temporary restraining order was issued by the federal court. (A-16) Plaintiffs moved to remand the case to state court, and the federal court denied this motion. (A-17) Defendants made successive motions to dismiss the suit on grounds of res judicata, sovereign immunity, federal preemption, and lack of standing, and the federal court also denied these motions. (A-17, A-18) Defendants appealed from the denial of their second motion to dismiss, and the United States Court of Appeals for the Fifth Circuit, holding that plain-

[4] An action has been filed in the District Court for the District of Columbia charging NIH with scientific misconduct and fraud in connection with the experiments conducted on, or planned to be conducted on, the remaining animals. The court recently declined to issue a restraining order prohibiting the destruction of three of the monkeys. *Physicians Committee for Responsible Medicine v. Sullivan*, case number 90-0084 (D.D.C.).

tiffs lacked standing, ordered the case dismissed.[5]

SUMMARY OF THE ARGUMENT

The Fifth Circuit improperly ruled that a federal agency may remove to a federal court an action brought solely on *state*-law grounds in a *state* court. The statute relied upon by NIH and the Fifth Circuit, 28 U.S.C. section 1442(a), provides that any action against *an officer* of a federal agency is removable, and not that a suit brought against *an agency* may be removed. Although there is a conflict in the lower federal courts concerning the interpretation of 28 U.S.C. section 1442(a) as it involves this question, and a minority of courts permit removal by federal agencies, petitioners respectfully maintain that the clear weight of the law and of logic supports those courts that have interpreted 28 U.S.C. section 1442(a) as *not* permitting removal under these circumstances.

If the Fifth Circuit approach is accepted, then state courts will be divested of jurisdiction whenever a case involves a "federal interest." The Fifth Circuit's action was particularly problematic in the present case as there was no evidence before the court that the federal agency that sought removal-the NIH-had an interest in the case that justified the exercise of federal jurisdiction over state claims in the first instance.

The predecessor of 28 U.S.C. section 1442(a) was enacted specifically to protect *federal customs officers* in

[5] When defendants appealed from the denial of their motion to dismiss, plaintiffs pointed out that the order was not appealable. Before the Fifth Circuit, defendants argued that they were appealing from the grant of the temporary restraining order, which, according to defendants, was tantamount to the granting of a preliminary injunction because of the duration of the TRO. *See infra* section E of the Argument herein.

the enforcement of an unpopular statute by providing a federal forum for defenses existing under federal law. Later expansions of the law, including the current section 1442(a), explicitly authorize removal of actions against federal *officers* only. Both the legislative history of the statute and the express language of section 1442(a) clearly indicate congressional intent to limit the right of removal under this provision to natural persons, and not to entire federal regulatory agencies.

Courts that have decided to the contrary are acting in explicit disregard of the legislative history, and express language of section 1442(a). Indeed, in some cases, courts have read the statute so broadly as to expand removal jurisdiction beyond the scope of the original jurisdiction of the federal courts. The majority rule, which would prohibit removal in these circumstances, accords with the explicit language of the statute, congressional intent, and common sense.

ARGUMENT

On December 28, 1988, plaintiffs filed their petition, which contained various *state*-law claims against Tulane, IBR, and NIH, in a *state* court in Louisiana. On that same date, the state court enjoined Tulane, the only party that had been served at the time, from the killing or other inhumane treatment of the remaining Silver Spring monkeys. Two days later, NIH removed the case to the federal court for the Eastern District of Louisiana. NIH predicated removal on 28 U.S.C. section 1442(a), asserting that NIH "is an agency of the United States of America, and the Federal District Courts have original jurisdiction over all actions commenced against such federal agencies."

Petitioners promptly moved for a remand to the

state court, contending that section 1442(a) authorized removal only of actions brought against *natural persons* who are federal *officers*. Petitioners recognized that the Fifth Circuit and a minority of jurisdictions construed the statute more liberally to permit removal of an action against a federal *agency* as well, but petitioners argued that the legislative history, purpose, and explicit statutory language demonstrated unequivocally that removal is limited only to actions involving *natural* persons who are federal *officers*. The district court upheld the removal based upon Fifth Circuit precedent, and the Fifth Circuit affirmed the decision with virtually no consideration of the countervailing argument based on the statutory language and history of section 1442(a), which has been accepted by the majority of jurisdictions to interpret section 1442(a).

A. The Plain Language of Section 1442(a) Authorizes Removal by Federal Officers, Not Agencies

As this Court has observed often: "The starting point for interpretation of a statute is the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Kaiser Aluminum and Chemical Corporation v. Bonjorno*, __U.S.__, 110 S.Ct. 1570, 1575 (1990)(quoting *Consumer Products Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). In this case, the statutory language conclusively establishes that removal is appropriate only for federal *officers* and not agencies.

Section 1442(a) is titled as "Federal Officers Sued or Prosecuted." In keeping with this title, section 1442(a) provides, in pertinent part:

> (a) A civil action or criminal prosecution commenced in a state court against any of the following *persons* may be removed by *them*. . .
>
> (1) any officer of the United States or any agency thereof, or *person* acting *under* him, for any act under color of such office or on account of such right, title or authority claimed under any act of Congress for the apprehension or punishment of criminals or collection of the revenue.

28 U.S.C. section 1442(a)(emphasis added).

By its own terms, the statute applies to suits against *natural persons* and not against agencies of the federal government. In subsection (a), the statute states that an action against any of the following listed *persons* may be removed by *them*. Further, in paragraph (1) under subsection (a), the listed person is *any officer* of the United States or of an agency thereof. The person may be an officer of the United States *or* an officer of an agency of the United States.

There can be no serious argument that the expression, "any agency thereof," contained in paragraph (1), was intended to confer the right of removal on agencies of the federal government. If Congress had wished to include federal agencies within the ambit of section 1442(a), Congress could have simply phrased paragraph (1) to read: "any officer of the United States, any agency thereof, ..." That is, Congress needed only to indicate that the removal right extended to *agencies* as well, and not just to natural persons. In this way, Congress could have conferred the removal right on agencies and not just officers. But Congress did not write such a statute; on the contrary, the language, syntax, and punctuation explicitly limited the scope of the statute to natural *persons* who are federal *officers*. Congress was fully aware of the distinction between "persons" and "agencies." For example, the

Administrative Procedure Act clearly defines "agency" as a concept that is separate and apart from "person," and, indeed, the definition of "person" explicitly *excludes* agencies. *See*, 5 U.S.C. section 551(1), 551(2)("person includes an individual, partnership, corporation, association or public or private organization *other than an agency*"(emphasis added)).

As further proof that Congress limited the scope of section 1442(a) to apply only to persons and not agencies, Congress chose to extend the right of removal to any "person acting under *him.*" If the right of removal extended to agencies as well as officers, the use of the word "him" would have been clearly incorrect. Instead, Congress would have had to use an expression like "or person acting under him *or for the agency.*" But Congress did not choose to write a different statute; rather, it wrote section 1442(a) as it stands, and explicitly chose to extend the right of removal to natural *persons* who are federal *officers* or to those *persons* working under *him*. As the Third Circuit observed: "We cannot read a statute to say what it does not say, and we think it plain from the punctuation of the sentence, and the use and placement of the word "him" that this statute merely allows removal by any officer . . . or person acting under him." *Lovell Manufacturing v. Export-Import Bank*, 843 F.2d 725, 733 (3d Cir. 1988).

B. The Legislative History of Section 1442(a) Supports a Literal Reading of its Terms

As this Court observed in *Willingham v. Morgan*, 395 U.S. 402, 89 S.Ct. 1813 (1969), the original federal officer removal statute was intended to protect federal customs officers who were enforcing a trade embargo with England over the opposition of the states in New England: "Obviously, the removal provision was an attempt to protect federal officers from interference by hostile state courts." 395 U.S. at 405; 89 S.Ct. at 1815. There is *absolutely nothing* in the history of section 1442(a) that would indicate that Congress intended to insulate federal regulatory agencies from the jurisdiction of state courts.

The predecessor of paragraph (1) of section 1442(a) was limited to *revenue* officers engaged in the enforcement of the criminal or revenue laws, and those acting under or by their authority. 1A *Moore's Federal Practice*, section 0.164[1] at 380-81. Although the present law broadens coverage to include federal officers other than those involved in the enforcement of the revenue laws, the coverage was broadened to include *additional federal employees*, and not to include non-natural persons or entities. *Cf. Michigan v. Banning*, 88 F.Supp. 449, 450 (E.D.Mich. 1950). According to Professor Moore:

> "[I]n extending the application of [Sec. 1442(a) paragraph (1) to federal officials and employees generally, the revision [of the Judicial Code of 1948] made no change in the theory or basis for removal that the civil suit or criminal prosecution must be against the officer or employee, and based upon an act or acts done under color of office, etc."

Id. at 382-84 (footnotes omitted). Thus, Professor Moore correctly concluded that "a suit against a government corporation, as distinguished from a suit against a federal official or one acting under him, is not removable under Sec. 1442(a)(1)." *Id.* It is clear that "[n]othing in the legislative history [of section 1442(a)(1)] reveals that the term "officer" was intended to include corporations or agencies as distinguished from individuals." *Lance International, Inc. v. Aetna Casualty and Surety Company*, 264 F.Supp. 349, 355 (S.D.N.Y. 1967).

C. *The Conflict Among the Jurisdictions Should be Resolved in Favor of the Plain Language of Section 1442(a), and its Legislative History*

There is a conflict among courts as to whether section 1442(a)(1) permits removal in the case of federal agencies. The majority of courts that have confronted the issue have held that "it is clear to us that a fair reading of the statute only allows officers, and not agencies, to remove cases to federal courts." *Lovell Manufacturing v. Export-Import Bank*, 843 F.2d 725, 733 (3d. Cir. 1988). *See also C.H. c. American Red Cross*, 684 F.Supp. 1018 (E.D.Mo.1987); *W-V Enterprises, Inc. v. North Kansas Savings Association*, 628 F.Supp. 1261 (D. Kan 1986); *Woodward v. Turnage*, 646 F.Supp. 219, 221 (E.D.Mo. 1986); Gensplit FInance Corporation v. Foreign Credit Insurance Association, 616 F.Supp. 1504, 1509 (E.D.Wis. 1985); *City of Alma v. Bell, Galyardt & Wells, Inc.*, 606 F.Supp. 686, 689-90 (D.Neb. 1985); *Lowe v. Norfolk & Western Railroad Company*, 529 S.Supp. 491 (D.Ill. 1982); *Brewer v. Department of Housing and Urban Development*, 508 F.Supp. 72, 74 (S.D.Ohio 1980); *KCPO Employees Credit Union v. Mitchells*, 421 F.Supp. 1327 (W.D.Mo. 1976); *California v. Bozarth*, 356 F.Supp. 667 (N.D.Cal. 1973); *Lance International, Inc. v. Aetna Casualty and Surety Company*, 264 F.Supp. 349 (S.D.N.Y. 1967); *Harlem River Produce Company v. Aetna Casualty and Surety Company*, 257 F.Supp. 160 (S.D.N.Y. 1960).

A minority of courts, however, including the Fifth Circuit in the present case, have held that section 1442(a)(1) permits federal *agencies* to remove to federal courts. These cases may be broken down into two categories.

First, there are cases in which a federal agency or private corporation did remove to federal court under section 1442(a), but where the issue of the scope of section 1442(a) was simply not raised. *See, e.g., Camacho v. Autoridad de Telephonos de Puerto Rico*, 868 F.2d 482 (1st Cir. 1989); *Johnson v. Showers*, 747 F.2d 1229 (8th Cir. 1084); *Monal Construction Company*, 539 F.Supp. 478 (W.D.Pa. 1982). In *Camacho*, plaintiffs brought suit in state court against two quasi-public telephone companies, alleging that they improperly intercepted plaintiffs' telephone calls. The telephone companies removed the action to federal court, and the "[p]laintiffs neither contested removal nor sought remand." 868 F.2d at 484. On appeal, plaintiffs did contest removal on the ground that the phone companies were not acting under the direction of government officials. The First Circuit rejected this claim, holding that plaintiffs had not contested the telephone companies' averment in their removal petition to the effect that at all times, the companies were acting under the orders and control of federal agents. The issue in *Camacho* was not whether section 1442(a) provided for removal only by natural persons, but rather, was whether, under the circumstances, section 1442(a) provided removal protection "to *private* persons, like appellees, who act under the direction of federal officers." *Id.* at 487. The court assumed, and the parties did not argue otherwise, that the appellees in *Camacho* were *persons* under section 1442(a).

Similarly, in *Johnson v. Showers*, the government made an unopposed request that a suit brought against an agency "should be deemed as one brought against" the agency's director, which the court simply accepted for purposes of section 1442(a). Again, the issue of the scope of section 1442(a) was neither raised by the parties nor discussed by the court. In *Monal Construction Company*, the court simply assumed that the Department of Housing and Urban Development could remove to federal court under section 1442(a) but the issue was neither raised nor

discussed.

Second, there are several cases in which the scope of section 1442(a) is discussed in terms of the person/agency question relevant to the instant case, and in whch the courts conclude that removal protection is not limited to natural persons who are federal officers or persons working at their direction. In *National Audubon Society v. Department of Water & Power*, 496 F.Supp. 499, 508 (E.D.Cal. 1980), the agency argued, and the court accepted, that the agency should be considered as "a person acting under [the federal officer]." In *Township of Middletown v. N/E Regional Office*, 601 F.Supp. 125, 127 (D.N.J. 1985), the court stated that the statutory language "could permissibly be interpreted to allow or disallow removal by a federal agency," and then simply proceeded to allow removal based on a view that the broader interpretation of section 1442(a) was required to protect federal authority.

Courts that give a broader interpretation to section 1442(a) tend generally to cite as authority C. Wright, A. Miller, and E. Cooper, *Federal Practice and Procedure*, section 3727, at 457; "It is not clear whether federal agencies themselves may remove under Section 1442 [but a] broad interpretation of the statute is clearly justified in terms of the intent of Congress to protect the valid exercise of federal authority." *See National Audubon Society*, 496 F.Supp. at 508; *Township of Middletown*, 496 F.Supp. at 127. The authority cited for this proposition in the Wright/Miller/Cooper treatise is this Court's decision in *Willingham v. Morgan*, 395 U.S. 402, 89 S.Ct. 1813 (1969). Nothing in *Willingham*, however, supports such a liberal interpretation of section 1442(a) that would extend removal protection beyond natural persons who are federal officers or those persons working under them. Indeed, the issue was never even presented to this Court in that case.

In *Willingham*, this Court was called upon to interpret the meaning of section 1442(a) in providing that an *officer* may remove an action commenced *against him* "for any act under color of such office. . . ." Two federal officers, the warden and chief medical officer at the United States Penitentiary in Leavenworth, Kansas, had been sued individually and personally by a prisoner for physical abuse allegedly imposed by the officers "on a frolic of their own with no relevancy to their official duties." 395 U.S. at 407, 89 S.Ct. at 1816. Thus, *Willingham* had nothing to do with a challenge against a federal agency. The officers removed the case to federal court and the district court judge, after denying a motion to remand, entered summary judgment in favor of the officers under the then-operative official immunity doctrine. On appeal, the Tenth Circuit reversed, holding that the "color of office" test of section 1442(a)(1) was "much narrower" than the test for official immunity.

This Court disagreed, holding that the test for removal should be broader, and not narrower, than the test for official immunity because the purpose of the removal statute was to provide a federal forum for cases in which federal officials must raise defenses arising from their official duties. In this connection, *and not in connection with any examination as to whether section 1442(a)(1) extended to provide removal protection to federal agencies*, this Court stated that "Congress has decided that federal officers, and indeed the Federal Government itself, require the protection of a federal forum. This policy should not be frustrated by a narrow, grudging interpretation of Sec. 1442(a)1)." 395 U.S. at 407, 89 S.Ct. at 1816. This Court properly construed the "color of office" test and found that because the officers' relationship to the prisoner derived solely from their official duties, the alleged acts at issue were "under color of. . .office" and the removal was, therefore, proper.

Willingham did not address the issue presented to

the Court in this case. Even Wright, Miller, and Cooper acknowledge that to the extent they rely on *Willingham* as support for an interpretation of section 1442(a)(1) that would cover federal agencies, the language in *Willingham* was *dicta*. *See* C. Wright, A. Miller, & E. Cooper, *supra*, at section 3727 at p. 457, n. 30. In urging a construction of section 1442(a)(1) broad enough "to cover all cases where *federal officers* can raise a colorable defense arising out of their duty to enforce federal law," *Willingham* simply did not give lower courts the license to read into the statute what it plainly does not say. 395 U.S. at 406-07, 89 S.Ct. at 1816. Indeed, reliance on *Willingham* at all is seriously misplaced in the light of this Court's explicit recognition in that case that section 1442(a)(1) was derived from an earlier statute that was expressly intended to protect *federal revenue officers*. *See*, 395 U.S. at 405-06, 89 S.Ct. at 1815-16.

Moreover, a liberal interpretation of section 1442(a)(1) that would allow removal whenever a federal agency is involved threatens to broaden removal jurisdiction far beyond original jurisdiction. For example, although the court in *Camacho*, *supra*, did not specifically address the question whether section 1442(a)(1) applied to federal agencies, the court stated that section 1442(a)(1) represents "a legislatively-spawned value judgment that a federal forum should be available when particular litigation implicates a *cognizable federal interest*." 868 F.2d at 487 (emphasis added). Because federal district courts do not have original jurisdiction whenever the United States is a party, or a "cognizable federal interest" is present, such an expansive interpretation of section 1442(a)(1) would create a removal jurisdiction that would be wider in scope than the original jurisdiction of the federal courts. Indeed, in *National Audubon Society*, the court was presented with this very argument, and, unlike *Camacho*, the argument

was presented in the precise context of determining whether section 1442(a)(1) conferred removal rights on federal agencies. The court in *National Audubon Society* stated that "[i]t has been suggested. . .that a reading of the statute as broadly as the court has suggested herein would authorize removal whenever the United States is a litigant. . . .The answer to that is short. *Removal jurisdiction may indeed be broader than original jurisdiction.*" 496 F.Supp. at 508-09 (emphasis added). This anomalous result is yet another reason to reject the expansive interpretation of section 1442(a)(1) accepted by the court below.

The majority view clearly does require remand of actions removed by federal agencies, but because remand orders are not considered final orders reviewable by appeal, *see* 28 U.S.C. section 1291; *Thermton Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 352-53, 96 S.Ct. 584, 593-94 (1976), it is not surprising that the majority view is expressed principally in district court decisions. *Lovell Manufacturing*, *supra*, the only circuit court decision articulating the majority view, contains a thoughtful analysis of the statute's language and legislative history. By contrast, the Fifth Circuit adopted the minority view without articulating any basis for its choice. The Fifth Circuit's ruling was erroneous, and this case should be remanded.

D. This Case Presents Issues of State Law That Are Within the Peculiar Province of the Louisiana State Courts to Resolve

In the earlier *International Primate Protection League v. Institute for Behavioral Research*, 799 F.2d 934 (4th Cir. 1986), *cert. denied*, 481 U.S. 1004, 107 S.Ct. 1624 (1987), the plaintiffs, including several plaintiffs involved

in the present suit, sued IBR, NIH, and others in *state* court, seeking custody of the monkeys under Maryland state law and seeking to enforce the federal Animal Welfare Act, 7 U.S.C. sections 2131-2157 (1988). NIH removed the case to federal court on the ground of a federal question. The Fourth Circuit held that enforcement of the federal Animal Welfare Act was entrusted to the United States Department of Agriculture and the plaintiffs had no standing to sue under that statute. After the court dispensed with the federal claims, the court declined to exercise pendant jurisdiction over the state law claims. Implicit in the court's ruling was a determination that section 1442(a)(1) does not establish federal jurisdiction over any action brought against a federal agency, as both NIH and the Department of Health and Human Services were defendants in that action.

When plaintiffs in the present action reinstituted those purely state law claims that the Fourth Circuit had referred to state court, NIH again removed to federal court. Because the monkeys had been moved to Louisiana, plaintiffs filed in a Louisiana state court, and NIH removed to a federal district court in one of the few jurisdictions in which such removal is tolerated in light of the Fifth Circuit's broad—and erroneous—interpretation of section 1442(a)(1). Although the Fourth Circuit dismissed those state law claims for want of jurisdiction, the Fifth Circuit exercised jurisdiction only long enough to dismiss plaintiffs' nonfederal claims (with prejudice) for lack of standing under Article III of the United States Constitution—a requirement peculiar to the federal courts.

The Fifth Circuit erroneously rejected petitioners' argument that the Fourth Circuit's ruling was *res judicata* as to the jurisdictional issue. Although dismissals for lack

of subject matter jurisdiction do not operate as adjudications on the merits, and thus do not preclude a second action on the same claim, such dismissals do generally preclude relitigation of the underlying issue of jurisdiction. *Voisin's Oyster House, Inc. v. Guidry*, 799 F.2d 183, 188 (5th Cir. 1986); *Dozier v. Ford Motor Company*, 702 F.2d 1189, 1194 (D.C.Cir. 1983)(per Scalia, J.); *Stewart Security Corporation v. Guaranty Trust Company*, 597 F.2d 240, 241 (10th Cir. 1979). Hence, the Fourth Circuit's judgment that the plaintiffs' state-law claims against NIH were not cognizable in federal court remained effective to preclude litigation of the precise issue of jurisdiction that led to the dismissal in the first instance.

Although petitioners had filed in a court of competent jurisdiction in light of the Fourth Circuit ruling, the Fifth Circuit accorded no preclusive effect to the Fourth Circuit's dismissal of the state-law claims. The Fourth Circuit's implied ruling was, however, the correct one. The claims asserted here, grounded in Louisiana principles of public nuisance, tort, and equity, presented issues of state law. The primates at issue in this litigation are *privately* owned and housed in a local *private* facility. As discussed *infra*, the federal agency's interest in this matter is peripheral at best, raising further questions about the propriety of federal intervention into a purely local matter.

E. The Fifth Circuit Improperly Usurped the Role of the District Court and Engaged in Ruling that NIH Had Sufficient Interest in this Action to Authorize the Exercise of Federal Jurisdiction

This Court has consistently admonished that "appellate courts must constantly have in mind their function is not to decide factual issues *de novo*." *Zenith Radio Corporation v. Hazeltine Research, Inc.*, 395 U.S. 100, 123, 89

S.Ct. 1562, 1576 (1969). *See also* Fed.R.Civ.P. 52(a). In the present case, there were serious questions presented in the district court concerning NIH's interest in the monkeys. These issues remained unresolved because although the district court had ordered discovery on this precise issue, the Fifth Circuit simply decided, on a tenuous factual record, that NIH was a proper party. In so doing, the Fifth Circuit invaded the fact-finding province of the district court and upheld jurisdiction on the basis of completely unsubstantiated assertions by NIH and under highly questionable circumstances.

Although petitioners named NIH as a defendant in this suit, petitioners challenged and questioned NIH's role in the proceedings from the outset. Indeed, the *only* reason that petitioners named NIH at all was because NIH claimed responsibility for the decision to kill the Silver Spring monkeys in December 1988, immediately before the suit was instituted. When NIH removed the case to federal court, petitioners moved to remand on the ground that section 1442(a)(1) is inapplicable to a suit against a federal *agency* and on the ground that NIH had an insufficient interest in the case to justify the presence of a nonfederal suit in a federal court.

With respect to the issue concerning section 1442(a)(1), the district court felt bound to follow the Fifth Circuit's precedent. On the question of NIH's interest, however, the district court reacted with caution and concern. The trial court observed: "We don't know why the government is in this suit, quite frankly. The government intervened,[6] but there are serious questions as to whether

[6] The district court stated that NIH had formally intervened, but as counsel pointed out subsequently, NIH had been named as a defendant. At an earlier hearing, however, counsel for plaintiffs had proposed dropping NIH from the suit, and NIH stated that it would simply intervene if dropped. The court was referring to that earlier hearing.

they should have custody of these monkeys." Hearing, May 3, 1989, at 5-6. When counsel for NIH made an unsubstantiated claim that NIH did have an interest, the district court responded:

> "*You know, you say that, but no one has has shown me one document that permits that.* I mean, you know, it's sort of working in a vacuum. The government has not given me one document. *The only documents that we have ever seen show that the Government's interest has long expired.* Now maybe there were some subsequent documents, I have never seen those. The government has refused—I shouldn't say refused, but they certainly have not done anything to show me that they have an interest in this case, and from what I can understand from Ms. Woodward, she has been attempting to get that information for a long time, even in other previous times, and has been unable to do so, so we have received nothing where the Court can definitely say that, sure, this document shows that the government does have an interest. We don't have anything. It has never been produced, never to this Court."

Id. at 15-16 (emphasis added). The district court ruled, and emphasized on several occasions, that discovery must go forward on the jurisdictional issue, the "very issue" to be placed before the Fifth Circuit on appeal and in case of remand, the "next issue before this Court." *Id.* at 20, 25, 26, 27-38.

NIH refused to document its interest, and refused to respond to plaintiffs' discovery requests relating to NIH's interest in the case. Instead, NIH appealed from the denial of its motion to dismiss (A-27). When plaintiffs pointed out

that the denial of the motion to dismiss was not an appealable order, NIH filed a novel pleading styled "Motion for Indicative Ruling," in which it requested that the district court "indicate" whether it would grant a preliminary injunction if the issue were before it. At the hearing on this "Motion for Indicative Ruling," the court indicated concern as to whether it even had jurisdiction to consider the motion in light of the pending appeal. The court did, however, deny the motion, and NIH then argued that the TRO the court had issued had been converted into a preliminary injunction by the length of its duration,[7] vesting in NIH the right to appeal from the issuance of a preliminary injunction. (A-29) Plaintiffs responded that NIH was simply trying to manipulate the proceedings to secure an appeal without responding to the discovery requests that the district court had ordered.[8] The Fifth Circuit denied plaintiff's motion to dismiss the NIH appeal. (A-22)

On appeal, then, the Fifth Circuit had nothing before it that would have established NIH's interest in the case apart from NIH's own unsubstantiated assertions that the district court had already explicitly found to be inadequate. Indeed, some of NIH's assertions, such as its claim of custody of the monkeys based upon an expired court order, were proven false. All of NIH's assertions were highly suspicious, especially in light of NIH's political interest in preserving the falsehood concerning its supposed court-ordered custody, and its earlier written admission that NIH had no further scientific use for the animals.

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[7] Of course, NIH had *consented* to the extension of the TRO, but then withdrew consent.

[8] Because of the pendency of the appeal, the district court opined that it had been stripped of jurisdiction to enforce its earlier order that discovery proceed on the issue of NIH's interest in the case. *See* A-20, A-23.

Despite the lack of evidence before the Fifth Circuit concerning the interest of NIH, the Fifth Circuit found as a fact that NIH's newly found fatal brain experiments on the primates was "in furtherance of NIH's statutory mission to conduct and fund biomedical research." (A-14-15) By adverting to NIH's "Statutory mission," the Fifth Circuit thereby completely sidestepped—and improperly so—the question whether NIH has any real interest and authority in this case.[9] The issue of NIH's interest was: (1) the central issue in dispute; (2) the issue vigorously contested by plaintiffs; (3) the issue on which the district court had made no finding; (4) the issue on which the district court had ordered further discovery; and (5) the issue about which the Fifth Circuit had *no* information before it apart from NIH's own self-serving and unsubstantiated statements that the district court had rejected. Such *de novo* fact-finding by the Fifth Circuit flies in the face of this Court's repeated admonitions concerning the role of appellate courts.

The NIH had—*at best*—a highly questionable interest in this action. This questionable interest renders all the more doubtful its right to invoke the protection of section 1442(a)(1) and to remove to a federal forum a case brought under *state* court concerning *privately owned* and *privately held* animals, and that could not be maintained in a federal court because of the standing requirements of Article III of the federal Constitution.

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[9] In an earlier proceeding, NIH had resisted efforts to block its return of the Silver Spring Monkeys to IBR by stating that it lacked authority to retain IBR's property. *See* NIH Memorandum in Support of Motion to Dismiss, p. 28, in *Humane Society of the United States v. Block*, No 81-2691 (D.D.C.)

CONCLUSION

For the foregoing reasons, the judgment of the court of appeal should be reversed, and the case remanded to the district court for purposes of remand to the state court.

Respectfully submitted,

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